'99 283 AUG 9 1999

DOCKET NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, _____

RICHARD A. D'AURIA

Petitioner,

v.

COMMONWEALTH OF PENNA.; PENNA. STATE POLICE BUREAU OF LIQUOR CONTROL ENFORCEMENT; R. VEIT, OFFICER, BUREAU OF LIQUOR CONTROL ENFORCEMENT; UNKNOWN MALE #1; UNKNOWN MALE #2; UNKNOWN MALE #3,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER PRO SE

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QUESTIONS PRESENTED FOR REVIEW

1. In light of the rulings in *Colonnade v. United States*, 397 U.S. 72 (1969)at 77 and *New York v. Burger*, 482 U.S. 691 (1986)at 703, which carefully limit the time, place and scope of an inspection search and the rulings in *Sharrar v. Felsing*, 128 F.3d 810 (3rd Cir. 1997)at 820, 829 and *United States v. Campbell*, 581 F.2d 22 (1978)at 25 citing exigent circumstances and the rulings in *Sharrar* by the Third Circut. Citing *Ybarra* pg 819 and their definition of seizure on pg 819.

   Q. Do the Fourth and Fourteenth Amendments to the Constitution permit absent exigent circumstances, the seizure of an non liquor entity neighborhood civic association's minutes book, personal papers and U.S. Mail of Petitioner in a search by State Liquor agents under force of arms and manpower seizing the freedom of movement of the objecting Petitioner during non-business hours, the Respondents admitting in their Responsive Pleading that they entered, searched and seized without warrant, consent or probable cause?

2. In light of the Federal Rules of Civil Procedure,

   Q. Did the Appeals Court sanction a proceeding far departed from the accepted and usual course of judicial proceedings as to call for this Court's exercise of supervisory power?

3. In light of the fact that R. Veit and the informer in this matter, Karen

Lee, an unsuccessful adversary in Family Court, are defendants in District Court, #98-290,

Q. Was it reasonable not to consolidate these two matters?

4. In light of the fact that the opinion of the U.S. Court of Appeals filed April 9, 1999 misread an incident that is described in Civil Action 98-290 and stated that during this inspection a weapon was pointed by the Respondents at Petitioner's son's head during the course of this incident.

Q. Did this misapprehension of fact impact on the decision and even more sinister is the fact can a Court in these United States sanction a deadly weapon being pointed at a mere witness to an incident labeled by the Court to be a routine inspection?

5. In light of the liquor code of Pennsylvania 47 P.S. 2-211(3) which requires probable cause and 47 P.S. 4-493(12) which emulates Federal statutes that inspection searches must be done during business hours.

Q. In consideration of all the facts in this matter is it possible to sustain the District Court's decision?

PARTIES

The Petitioner in this matter was the Plaintiff in District Court and the Appellant in the Court of Appeals.

The Respondents Richard Veit, Keith Sinclair, Gerald Donati and Michael Katch were the Defendants in District Court, the Appellees in the Court of Appeals and the only remaining Respondents in this matter.

Note: The Petitioner withdrew his Complaint against the Commonwealth of Pennsylvania State Police Bureau of Liquor Enforcement they being shielded by Sovereign Immunity.

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LIQUOR CODE PA.

47 P.S. 2-211(3) . . . . . (ii), 8

47 P.S. 4-493(12) . . . . . (ii)

DECISIONS BELOW

The District Court granted Summary Judgment in favor the the Defendants-Respondents, Order entered 5-14-98 and is reprinted with the Appendix in this Petition at A.

The Petitioner's Motion for Rehearing and Change of Judge for Civil Actions 97-5863 and 98-290 Complaint of Prejudicial Misconduct dated May 23, 1998 at Appendix B.

The District Court Order denying Motion for Rehearing and Change of Judge dated 6-1-98 at Appendix C.

U.S. Court of Appeals Third Circuit Opinion filed 4-9-99 affirming Summary Judgment to the Appellees-Respondents at Appendix D.

U.S. Court of Appeals Sur Petition for Rehearing and Suggestion for Rehearing En Banc dated 5-12-99 denying Peitioner's Appeal at Appendix E.

STATEMENT OF JURISDICTION

(i) Petition for Rehearing and suggestion for Rehearing en Banc was denied by a majority of the Third Circuit Judges on May 12, 1999.

(ii) The Statutory provision inferring on the Supreme Court jurisdiction to review the judgment in question by Writ of certiorari 28 USCA 1254(1).

CONSTITUTIONAL PROVISIONS

Constitutional Amendment IV (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitutional Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (The Petitioner is a citizen of the United States).

STATEMENT OF THE CASE

The basis for Federal jurisdiction in a Court of the first instance is 28 USCA 1331.

On September 16, 1995, the Petitioner received a written request for examination of specific records maintained by the 48th Ward Republican Club, a liquor licensed establishment, who the Petitioner is President of. The club rents the first floor of the building. The request was for September 18, 1995. On September 18, 1995,

Respondent R. Veit called and requested a change of date to September 19, 1995.

On September 19, 1995, the Petitioner and his son who both reside in the apartment on the second floor of the building in question were working on neighborhood civic association records the office of which is maintained on the second floor of the building.

The Petitioner and his son moved the civic association records to the first floor in order to hear the doorbell. The specific documents requested being on the first table closest to the door so that they may be handed to Veit.

When the doorbell rang Petitioner who was working on the second level of the first floor (the first floor is a bi-level and the only part of the licensed premises), Petitioner unlocked the door and while his hand was still on the knob of the deadlock the door was abruptly pulled out pulling Petitioner forward. Petitioner grabbed the wall next to the door so as not to be pulled forward and out of the front door. Four armed individuals aggressively entered with exposed firearms and spread throughout the first floor and sub level basement. As the books and records specified were ready and available to be handed to Veit and Petitioner's knowledge that under Federal and State Statutes that inspection searches may only be conducted during business hours, a request was made to see a search warrant. When the response was no, Petitioner asked what right they had to be doing what they were doing. Veit stated that he had proof that it was a one man operation. As one of the individuals was going up an open staircase into the

private residence, Petitioner called out to him and started to move in that direction however Petitioner's movement was seized by Veit. The door to the residence was hit with a resounding thud in an attempt to gain entry however the door held. Over Petitioner's continued objections a search was conducted that included personal mail, letters and articles of the Petitioner. The first floor of the building being the only passageway to the residential premises and the premises not being open for business it was natural to have U.S. Mail, personal articles, letters and writings on the first floor.

The Respondents seized the personal mail, letters and articles of the Petitioner and the entire records and membership list of the neighborhood civic association placing them all in the civic association's minutes book. Respondents also seized the entire records, books, membership lists, individual membership cards of the 48th Ward Republican Club giving Petitioner a receipt signed by Veit for the civic association minutes book and records of the club without providing copies thereof over the objections of the Petitioner.

The Petitioner attempted to resolve this matter through the chain of command. A letter of complaint sent to the Commander of the Philadelphia Unit was given to Veit with a Post-It note attached. No other action was taken, Docket #25(Exh. Veit's Dep.). Attempts to have the articles that were seized that were outside the scope of civilian state liquor enforcement agents and to have copies made that were within their scope went without success.

It was divulged during Discovery that an adversary who was unsuccessful in Family Court notified the Bureau on May 15, 1995, that the Petitioner was a one man club, kept guns behind the bar and engaged in after hour drugs.

A computer generated investigative copy showing the adversary, Karen Lee, was in telephone contact with liquor enforcement on 5-15-95.

On September 18, 1997, the Petitioner filed a Complaint with the District Court concerning the forced entry, search and seizure and the fact that after a letter of complaint was sent to Officer Veit's command that Officer Veit filed investigative reports that were fabricated in time, date and event which concerned incidents unrelated to the entry, search and seizure. The Complaint also stated that this was the first in a series of events involving Veit and other officers of the state which had perpetuated to this date.

Veit's counsel, Pa. Deputy Attorney General, R.J. Henzes, filed a response to the Complaint on October 21, 1997 which states in part,

> "Defendants admitted that they entered and searched the premises of 1734 Snyder Avenue without a warrant, consent or probable cause, that they inspected items in the premises and that they seized and took away the minute book and records of the civic association giving plaintiff receipt for the same".

The Response was filed after a request for Default Judgment was filed on October 20, 1997, Docket #6. The Summons requirement lapsing on October 14, 1997. The District Court accepted the Response filed on October 21, 1997, without excuse or Motion mandated by FRCP #60(b)and #55, denying Petitioner's Motion, Docket #8.

On December 24, 1997, Petitioner filed a Motion for Disclosure of the names of the three unknown males with the subheading that the Respondents had failed to cooperate in Discovery, citing FRCP 15(c)3, Docket #12,

The Deputy Attorney General responded with the names, Docket #13. The Court filed an Order on January 5, 1998, denying Petitioner's Motion as moot, Docket #14.

On January 12, 1998, another Motion to amend the Complaint back to the date of the original Pleadings per FRCP, Rule 15(c)(3)(A)(B) was filed by the Clerk, Docket #15.

On February 20, 1998, a letter of complaint was faxed to the judge's chambers, Appendix F which complained about the Clerk's response to Petitioner's question, "How do I amend a Complaint if not by Motion?" The response was to seek out an attorney. The letter further indicated the defense provided argument outside the scope of the proceedings. It further complained about the communication sent by opposing counsel to the Court on February 4, 1998 for which only a cover letter was received by this Petitioner. This letter was never docketed or responded to, nor was the contents of Respondents communication to the Judge divulged, however, in the Court's Order, filed June

1, 1998, Docket #29, page 4, footnote 4, the Court refers to the letter and rules it a Motion and dismissed it without merit. App. C.

On January 21, 1998, Docket #16, a Motion for Summary Judgment was filed by the Petitioner citing the admissions of the Respondents supported by Affidavit of Mark D'Auria and the oral Depositions of Mark and Richard D'Auria all of which show a forced entry, the threat of arms, the seizure of movement of the Petitioner, the seizure of papers, articles and documents which were outside the scope of the authority of the Respondents.

On January 29, 1998, Docket #20, the Respondents filed a Motion for Summary Judgment.

On February 17, 1998, Docket #25, a Response to the Respondents Motion for Summary Judgment was filed by the Petitioner citing that the Motion was contrary to the Respondents previous Responsive Pleading, Docket #7, that the Motion was absent evidence of the exigent circumstances provided in their counsel's assertion, that the Motion was not responsive to material issues raised in Petitioner's Motion for Summary Judgment, that it failed to address all the allegations, that the unsupported arguments in the Motion were controverted in total by the sworn Depositions that the Respondents placed into evidence and marked as exhibits #1 and #2, that the Motion violated FRCP, Rule 56(e) in that it set forth assertions that would not be admissible as evidence being the mere allegations of counsel unsupported by any evidence whatsoever and was contrary to their initial Responsive Pleading. The Petitioner included the

Deposition of Veit which showed that Veit had by his own words, "no idea" of the rules and regulations concerning search and seizure. The Petitioner also pointed out the fact that opposing counsel during the Deposition refused to permit further questioning of Veit concerning his knowledge of search and seizure in violation of FRCP 30(c). Petitioner further pointed out that Summary Judgment should not be granted where the party opposing the Motion has been denied reasonable access of potentially favorable information. *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F2d 428 (CA2 1980).

The above cited facts were listed in the Informal Brief to U.S. Court of Appeals for the Third Circuit dated August 22, 1998.

In Petitioner's Informal Reply Brief docketed October 2, 1998, under the Statement of Issues the Petitioner points out the denial of fundamental Due Process with clear errors of law appearing on the face of the record.

That the District Court permitted harmful error when it permitted inference upon inference on the unsupported conjecture of counsel to outweigh the Responsive Pleading of Respondents, Docket entry #7 and the two Depositions that they stated they relied on in their Motion for Summary Judgment, Docket entry #20,(Exh. #1 and #2).

That the District Court citing *Lewie's Lounge,* an unlicensed speakeasy and 47 PA 2-211(3) which requires a determination of probable cause did not apply on this matter as the location is duly licensed and the Appellant admitted there was no probable

cause nor did they produce any evidence or testimony concerning probable cause or exigent circumstances or any violation of law on the part of the Petitioner concerning the entry, search and seizure nor did the articles they seized culminate in a violation of liquor law or any other laws.

That the District Court err'd when they were notified that the Petitioner was denied reasonable access to potentially favorable information in reference to the Deposition of R. Veit, Docket entry #25, page 19.

That the District Court permitted the Respondents to exceed the purpose and scope of their inspection based on the Discovery of exigent evidence inferred by their attorney in the absence of this exigent evidence ever being produced or described.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Third Circuit has entered a decision in conflict with its decision in *Sharrar v. Felsing* and with the Supreme Court's decisions in *Colonnade Corp. v. United States,* and *New York v. Burger, U.S. v. Biswell*. The Third Circuit has sanctioned actions by the District Court that are far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory powers.

Petitioner asserts that if this wrong is left standing that he has been deprived of Constitutional and natural rights. It appears evident on the record that Petitioner was not granted fair and

impartial review of this matter.

Further, liquor agents given the extraordinary power by the Courts below of force of arms, forced entry, search and seizure in a routine inspection at a time precluded by law creates an unnecessary danger to the occupants and to the agents effecting the entry, search and seizure as well as violating the Statutes of the State of Pennsylvania and all Federal Statutes that govern liquor enforcement. It is common sense that you do not point a gun unless you are prepared to pull the trigger. In the instant matter the lack of probable cause, warrant or consent is evident on the record and in the admissions in Respondents Pleadings.

Petitioner respectfully submits that the record will show that Petitioner has been denied basic rights and that a Writ of Certiorari should be granted.

Respectfully submitted,
by Pro-Se Petitioner

Date: 8-9-99

INDEX TO APPENDICIES

APPENDIX A

District Court Order Granting Summary Judgment in Favor of the Defendants-Respondents entered 5-14-98, Docket #26.

APPENDIX B

Plaintiff-Petitioner's Motion for Rehearing and change of Judge for Civil Actions 97-5863 and 98-290, Complaint of Prejudicial Misconduct, dated May 23, 1998, Docket #27.

APPENDIX C

District Court Order Denying Motion for Rehearing and Change of Judge, filed June 1, 1999, Docket #29.

APPENDIX D

U.S. Court of Appeals Third Circuit Opinion filed April 9, 1999 affirming Summary Judgment to Appellees-Respondents.

APPENDIX E

U.S. Court of Appeals Sur Petition for Rehearing and Suggestion for Rehearing En Banc dated May 12, 1999.

APPENDIX F

Petitioner's two page letter to the District Court dated February 19, 1998 and received by fascimile by the Court on February 20, 1998.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD A. D'AURIA	:	CIVIL ACTION
	:	
V.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, et al,	:	
	:	
	:	No. 97-5863

ORDER

AND NOW, this 14th day of May, 1998, upon consideration of defendants Richard Veit, Gerald Donati, Keith Sinclair, and Michael Katch's motion for summary judgment, and plaintiff's response thereto, and plaintiff's motion for summary judgment, and defendants' response thereto, and the Court finding that:

(a) Pro se plaintiff Richard D'Auria (("D'Auria") filed this **S** 1983 action against Pennsylvania Bureau of Liquor Control Enforcement Officers Richard Veit, Gerald Donati, Keith Sinclair, and Michael Katch (collectively "the defendants") claiming that they violated his Fourth Amendment rights when they searched and seized books and records from the James H. Irving 48th Ward Republican Club;[1]

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[1] On November 17, 1997, we dismissed plaintiff's claims against defendants Commonwealth of Pennsylvania and the Pennsylvania Bureau of Liquor Control. See Richard A. D'Auria v. Commonwealth of Pennsylvania, Civ. No. 97-5863 (E.D. Pa. Nov. 17, 1997).

(b) The James H. Irving 48th Ward Republican Club ("the Club") is a private club located on 1734 Snyder Avenue in Philadelphia, which in 1995 had a Pennsylvania Liquor Control Board license to service alcohol;[2]

(c) D'Auria is the president of the Club;

(d) On September 19, 1995, at approximately 10:15 a.m., the defendants arrived at Club for a pre-arranged meeting to investigate possible Liquor Code Violations;[3]

(e) After D'Auria let the defendants into the Club, the defendants inspected the Club records and informed D'Auria that they suspected he was running a "one-man club";[4]

(f) After spending roughly fifteen to twenty-five minutes in the Club, see Richard D'Auria Deposition at p. 10 and Plaintiff's Exhibit 3, the defendants removed several sets of books and records from the Club, see D'Auria Deposition at p. 21 ("they took notes and records books from the 48th Ward,

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[2] The Club is apparently located in the same building where D'Auria resides.

[3] D'Auria acknowledges that the meeting was originally set for September 18, 1995, but was moved to September 19, 1995 at the request of defendant Veit. See D'Auria Deposition at p.14-15.

[4] While the club is ordinarily owned by its members and operated for their benefit, a "one-man club" is controlled by only one person. United States v. Rothberg, 896 F. Supp. 450, 452 n.2 (E.D. Pa. 1995).

lease agreement, amortization schedule, all the membership records, liquor purchase book, beer purchase book, dues record book, and the civic association minutes book");[5]

(g) On the basis of the defendants; investigation, the Club was issued a citation for violations of the Pennsylvania Liquor Code, and later stipulated to a $150 fine and a three day suspension, see Plaintiff's Exhibit B, Transcript of May 8, 1996 Hearing before David L. Shenkle, Administrative Law Judge;

(h) D'Auria filed this action claiming that the defendants; search of the Club and their removal of documents violated his Fourth Amendment rights and injured his reputation in the community, see Complaint at unnumbered **ss** 3-4;[6]

(i) The defendants and the plaintiff now move for summary judgment;

(j) A summary judgment motion should only be granted if we conclude that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c);

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[5] D'Auria states that these books and records were later returned to the Club about three weeks later. See D'Auria Deposition at p.15, 21.

[6] While D'Auria does not specify whether he is suing the defendants in their official or personal capacities, because he has filed his complaint pro se we will construe his claims liberally. Lewis v. Attorney General of the United States, 878 F.2d 714, 722 n.20 (3d Cir. 1989).

(k) With a motion for summary judgment, the moving party bears the burden of proving that no genuine issue of material fact is in dispute, see Matsushita Elec. Indus. Co. Ltd. V. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986), and all evidence must be viewed in the light most favorable to the nonmoving party, see id. at 587.

(l) Once the movant has carried his initial burden, then the nonmoving party "must come forward with "specific facts showing there is genuine issue for trial,[1]" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)) (emphasis omitted), see also Anderson v. Liberty Lobby, Inc., , 477 U.S. 242, 248 (1986)) (holding that the non-moving party must produce evidence such that a reasonable jury could find for that party), Celotex Corp. V. Catrett, 477 U.S. 317, 324 (1986)) (holding that the non-moving party must go beyond the pleadings to show that there is a genuine issue for trial);

(m) First, defendants correctly assert that the claims against them in their official capacity are barred by sovereign immunity, which extends to "officials and employees (of the Commonwealth) acting within the scope of their duties," 1 Pa. Cons. Stat. Ann. **S** 2310;

(n) While sovereign immunity has been waived only for certain negligence claims, see 42 Pa. Cons. Stat. Ann. **S** 8521-22, none of the circumstances in which the Commonwealth has waived sovereign immunity could conceivable apply in this case;

(o) Turning next to the question of qualified immunity for the defendants in their personal capacity, it is now well-settled in this Circuit that the issue of qualified immunity is "purely legal question," Acierno v. Cloutier, 40 F.3d 597, 609 (3d Cir. 1994) (en banc), which should be resolved on summary judgment rather than left to a jury at trial, see Hunter v. Bryant, 502 U.S. 224, 228 (1991) ("Immunity ordinarily should be decided by the court long before trial."); Sharrar v. Felsing, 128 F.3d 810, 828 (3d Cir. 1997) *holding that "the reasonableness of the officers' beliefs or actions is not a jury question");

(p) Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known," Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982);

(q) Before considering the reasonableness of the officers' conduct here, we must initially address whether D'Auria alleges the violation of a clearly-established constitutional right, see Seigert v. Gilly, 500 U.S. 226, 232 (1991);

(r) While the Fourth Amendment's prohibition against unreasonable searches and seizures is applicable to commercial premises as well as to private homes, see New York v. Burger, 482 U.S. 691, 699 (1987), the United States Supreme Court has recognized an exception to the warrant requirement for administrative inspections

in "closely regulated" businesses, see id. at 693.; [7]

(s) The liquor industry has long been regarded as a closely regulated industry, see Colonnade Catering Corp. V. United States, 397 U.S. 72 (1970) (explaining the long history of governmental regulation has subjected the liquor industry to close supervision and inspection), Commonwealth v. Runkle, 430 A.2d 676 (Pa. Super. 1981) (holding that an agent for Liquor Control Board did not need a warrant to search a licensed private club); indeed, the breadth of the power conferred in section 2 of the Twenty-First Amendment [8] is so great that it permits state intrusion into otherwise constitutionally-protected precincts. see, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330, 84 S.Ct. 1293, 1297 (1964) ("a State is totally unconfined by traditional Commerce Clause limitations when it restricts the

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[7] The greater latitude to conduct warrantless inspections reflects the rationale in Burger that although the owner or operator of a business has a reasonable expectation of privacy in commercial property, that expectation is different from, and less than, what a homeowner has because the proprietor of a business is on notice of a closely regulated industry that his property will be searched.

[8] U.S. Const. Amend. XXI, s 2, provides:
> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

importation of intoxicants destined for use, distribution, or consumption within its borders."); Doran v. Salem Inn, Inc., 422 U.S. 922, 932-33, 95 S. Ct. 2561, 2568 (1975) ("the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in the nude dancing");

(t) In this case, the defendants conducted a warrantless search of the Club pursuant to the Pennsylvania Liquor Code;[9]

(u) In his motion papers and deposition, D'Auria argues that while the defendants had legal authority to undertake a warrantless search of the Club pursuant to the Liquor Code, the search in this case was not undertaken during the Club's normal "business hours" as a Liquor Code requires, see 47 Pa. Cons. Stat. Ann. S 4-493(12);

(v) As noted above, however, D'Auria agreed to meet the defendants at the Club at a pre-arranged time and date (an arrangement necessitated by the reality that the Club was never open "in the daytime", D'Auria dep. at 16) and he voluntarily allowed the defendants into the Club, id. at p.14-15;

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[9] For example, 47 Pa. Cons. Stat. Ann. S 4-493(12) require an liquor licensee to keep two years of complete records covering operation of the business and must allow the Bureau of Liquor Control to have "access thereto or the opportunity to make copies of the same when the request is made during business hours." Id.

(w) Accordingly, D'Auria's claim that the defendants' warrantless search of the Club during non-business hours violated his statutory and constitutional rights cannot withstand summary judgment when D'Auria acknowledges that he agreed to a pre-arranged time and date to meet with the defendants;[10]

(x) Next, D'Auria contends that the seizure of the Club's books and records violates Pennsylvania law and his Fourth Amendment rights;

(y) D'Auria contends that while the defendants were permitted to review and photocopy the Club's books and records, the Pennsylvania Liquor Code does not contemplate the removal of the books and records from the Club's premises, see 47 Pa. Cons. Stat. Ann. § 4-493(12);

(z) The removal of the Club's documents from the Club's premises does not constitute a clear violation of D'Auria's constitutional or statutory rights;

(aa) First, it is not completely clear how the removal of the Club's records implicates D'Auria's constitutional rights

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[10] D'Auria contends that once he unlocked the door and allowed the defendants to enter the bar, the defendants were rude and aggressive toward him and his son. Such allegations, without more, neither constitute a constitutional claim nor alter his consent to meet them during non-business hours.

or constitutes constitutional injury to him;[11]

(bb) Second, while one provision of the Liquor Code contemplates only the photocopying of records by Liquor Control Officers, see 47 Pa. Cons. Stat. Ann. **S** 4-493(12), there is at least one other provision in the Liquor Code that permits the warrantless seizure and removal of "equipment" and "materials" related to the unlawful sale of liquor, see 47 Pa. Cons. Stat. Ann. **S** 2-2112(3); [12]

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[11] In order for D'Auria to have standing to challenge the seizure of the documents in the Club, D'Auria must have a legitimate expectation of privacy in the items the defendants seized. see Minnesota v. Olson, 495 U.S. 91, 95-96 (1990). The items seized here appear to be several books of Club records as well as the records of a civic association of which D'Auria a member. As D'Auria insists that the Club is not his alter ego, it will not do for him to equate the Club with himself for Fourth Amendment purposes. D'Auria does mention, however, that one of the books seized contained some of his own "personal correspondence." See Plaintiff's Response to Defendants' Motion at p.3. Accordingly, we will assume, for purposes of this motion, that D'Auria has standing to challenge the defendants' removal of at least some of the documents.

[12] In his deposition and motion papers D'Auria argues that the records and papers the defendants seized are not "equipment" or "materials" within the meaning of the Liquor Code. While no Pennsylvania Court has directly addressed the issue in the present context, at least one court has found that for purposes of forfeitures under the Liquor Code, see 47 Pa. Cons. Stat. Ann. **S** 6-601 et seq., the terms "equipment, materials and utensils," include "notebooks" and "documents" used in the operation of a bar. See Commonwealth v. Various Item's Seized from Lewie's Lounge on January 5, 1989, 601 A.2d 380, 383 (Pa. Commw. Ct. 1991). Lewie's Lounge persuades us that defendants had statutory authority to remove the papers at issue without a warrant.

(cc) However, even assuming that D'Auria has standing to raise Fourth Amendment claims and further assuming that a violation of his constitutional or statutory rights occurred, we find that the defendants actions are in any event protected by qualified immunity;

(dd) As noted above, government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known," Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982);

(ee) Particularly in s 1983 cases involving alleged violations of the Fourth Amendment, the Supreme Court has emphasized that the inquiry is whether a reasonable officer could have believed that his conduct was lawful, in light of the clearly-established law and the information in the officer's possession, see, e.g., Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam);

(ff) Thus, law enforcement officers who "reasonably but mistakenly" conclude that their conduct comports with the requirements of the Fourth Amendment are entitled to immunity, see id.;

(gg) I this case, the defendants, fearing that D'Auria would alter the records, see Defendants' Motion for Summary Judgment at p.5, removed them from the Club;

(hh) We find that such conduct, under the circumstances and given the Liquor Control Board's extensive administrative powers over liquor licensees, is reasonable, does not constitute a clear violation of D'Auria's constitutional or statutory rights, and therefore is entitled to qualified immunity;

(ii) Accordingly, we will enter summary judgment in favor the defendants;

It is hereby ORDERED that:

1. Plaintiff's motion for summary judgment is DENIED;
2. Defendants' motion for summary judgment is GRANTED;
3. JUDGMENT IS ENTERED in favor of defendants Richard Veit, Gerald Donati, Keith Sinclair, and Michael Katch and against the plaintiff Richard A. D'Auria; and
4. The Clerk shall CLOSE this case statistically.

BY THE COURT:

"s/ Stewart D. Dalzell
Stewart Dalzell, J.

ENTERED: 5-14-98
CLERK OF COURT

APPENDIX B

May 23, 1998

Re: Richard A. D'Auria
Civil Actions
Case (97-5863
Case #98-290

FILED MAY 22, 1998

Michael E. Kunz
Clerk of the Court
United States District Court for the
Eastern District of Pennsylvania
U.S. courthouse
601 Market Street, Room 2609
Philadelphia, PA 19106-1797

Dear Sir:

Enclosed find Plaintiff's Motion for Rehearing of Civil Action #97-5863 and a change of Judge for Civil Actions 97-5863 and 98-290 based on a Complaint of Prejudicial Misconduct. The Plaintiff has the highest regard for the Honorable Judge Stewart Dalzell. However, it is evident that a member or members of the Court's staff are clearly biased in favor of the Defendants and prejudicial against the Plaintiff. The acts and omissions in this matter have denied Plaintiff the right to a fair and impartial review of the evidence on file forcing the Plaintiff to request recusal fo the Judge in the above captioned matters.

Enclosed also find Plaintiff's previous Complaint of Misconduct sent via Fax transmission to the Court on February 20, 1998, which has not been responded to.

"s/ [signature]"

Richard A. D'Auria
1734 Snyder Avenue
P.O. Box 6444
Philadelphia, PA 19145
Phone: 215-462-0310
Fax: 215-334-1233

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Richard D'Auria — CIVIL ACTION

Plaintiff

v.

FILED 5-22-98
By: "s/_____"
Deputy Clerk

R. Veit, et al

Defendants — NO.: 97-5863

MOTION FOR RETRIAL

Plaintiff respectfully requests a retrial in the above captioned matter as per the Federal Rules of Civil Procedure 59 (a). Attached herein is a Complaint of Judicial Misconduct which contains the reasons for the request.

By: "s/ [signature]
Richard A. D'Auria
Plaintiff, Pro-Se
1734 Snyder Avenue
P.O. Box 6444
Philadelphia, PA 19145

May 24, 1998

Re: Richard A. D'Auria
Civil Actions
Case #97-5863
Case #98-290

Michael E. Kunz
Clerk of Court
United States District Court for the
Eastern District of Pennsylvania
U.S. Courthouse
601 Market Street, Room 2609
Philadelphia, PA 19106-1797

Dear Sir:

Application is made, for the reasons set forth in the enclosed Complaint and supporting affidavit that appropriate proceedings be taken under 28 USCS 144 to assign another judge to hear the above captioned proceedings.

"s/ [signature]"

Richard A. D'Auria
1734 Snyder Avenue
P.O. Box 6444
Philadelphia, PA 19145
Phone: 215-462-0310
Fax: 215-334-1233

AFFIDAVIT OF PREJUDICE OF JUDGE

United States District Court for the Eastern District of Pennsylvania

Re: Richard A. D'Auria
Civil Actions
Case #97-5863
Case #98-280

Richard A. D'Auria, being duly sworn, deposes and says:

1. I am the Plaintiff in the above entitled cause.
2. I believe that the Court of the Honorable Stewart Dalzell, Judge of the Untied States District Court in which this action was commenced has personal bias and prejudice against me and the reason for such belief is described in Plaintiff's enclosed Complaint.

Date: May 24, 1998

"s/ [signature]"
Plaintiff, Pro-Se

Subscribed and sworn to
before me this 24th,
day of May, 1998.
"s/ [signature]"
SHARON L. D'AURIA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires July 9, 1998

COMPLAINT

1. Complainant

Richard A. D'Auria
1734 Snyder Avenue
P.O. Box 6444
Philadelphia, PA 19145
Phone: 215-462-0310
Fax: 215-334-1233

2. The Court that is the subject of this Complaint:

The Honorable Stewart Dalzell

3. Statement of Complaint:

Plaintiff asserts that a member or members of the Court's legal staff has engaged in conduct prejudicial to the effective and expeditious administration of the business of the Court. On May 14, 1998, the Court issued an Order granting Summary Judgment to the Defendants in this matter. The content of this Order has invented testimony [1], omitted pertinent testimony [2], ignored the Defendants admissions [3], provided argument in the defense's behalf not on the record [4], ignored argument in Plaintiff's Pleadings and Motions [5], utilized a Statute that mandates probable cause contrary to the Defendants pleadings and testimony [6], cited the persuasion of case law reserved for n unlicensed speakeasy ignoring the fact that the establishment in question is duly licesned breaking ground that imperils the rights of all licensed

establishments [7], in order to extricate the Defendants the legal analyst or analysts have crafted a scenario of events unsupported by the record o0r by law [8].

Footnote [1,2,3]

On page 7 of the Court Order Footnote 10 the Court states, "D'Auria contends that once he unlocked the door and allowed the defendants to enter the bar, the defendants were rude and aggressive toward him and his son. Such allegations, without more, neither constitute a constitutional claim nor alter his consent to meet them during non-business hours".

The word rude is no where in the record or testimony. The word, "aggressively and with exposed firearms" was used in the initial Complaint to describe the entry into the location in question. The Defense placed as exhibits the depositions of the Plaintiff and his son. Plaintiff's deposition at page 16 shows a forcible entry without consent and is further supported by the Defense's response where they admit that they entered, searched and seized without consent, warrant or probable cause which is further supported by deposition of Mark D'Auria.

Footnote [4]

The Court Order, page 7, item V states, "As noted above however, D'Auria agreed to meet the defendants at the Club at a pre-arranged time and date (an arrangement necessitated by the reality that the Club was never open "in the daytime", D'Auria dep. at 16) and he

voluntarily allowed the defendants into the Club, id. at page 14-15;"

The Plaintiff's exhibit B referred to in paragraph G of the Court Order clearly indicates under Findings of Fact that on April 8, 1995 Defendant Veit in the course of his employment worked from 3:00 AM to 3:30 AM; that on June 10, 1995, Defendant Veit worked from 2:00 AM to 3:15 AM; that on August 12, 1995, Defendant Veit worked from 2:30 AM to 3:20 AM; that Defendant Veit, et al are civil employees of the Bureau of Liquor Enforcement whose assignment by nature necessitates other than working in the daytime and the work voluntarily is not consistent with the Defendants admissions on file nor the depositions they placed into evidence.

Footnote [5]

Neither the Court Order nor Defendants motion for Summary Judgment address the deprivations of rights, privileges and immunities secured by the Constitution nor the right to petition government for redress or the fabrication of evidence by Defendant Veit contrary to the Rule of Federal Procedure.

The Plaintiff in his Complaint states that a letter of complaint was sent to Defendant Veit's commander indicating that investigative reports were fabricated in time, date and event. The commander's response to a petition for redress of Plaintiff's grievance was to give Plaintiff written instructions to seek due process in the Courts. A copy of this letter is in the possession of the Court. Further, in Defendant Veit's deposition, page 24, the defendant indicates that there was never an investigation of the Complaint and that the only action taken was for him to receive a copy of the Plaintiff's letter of complaint with a Post-it note on it from his commander, Defendant J. Lyle, thereby depriving the Plaintiff of his right to petition government for redress of grievance, in violation of First and Fourteenth Amendment rights which the Court has chose not to address.

Footnote [6]

The Statue utilized in the Court Order page 8, (bb), requires a showing or probable cause which is not on the record. In fact, the record refutes a showing of probable cause and further the Court states, "while one provision of the Liquor Code contemplates only the photocopying of records by Liquor Control officers" when in fact there are four statutes concerning the maintaining of records and the right of inspection during business hours articulated in Plaintiff's Motion for Summary Judgment. Further the Statute cited by Plaintiff hqs a penalty for refusal by a licensee who denies the opportunity to make copies of same when the request is made during business hours. An unlicensed premises has no such right to deny access for a search and seizure.

Footnote [7]

The case cited on page 8-9, Footnote 12 of the Court Order, the Court concedes that no Pennsylvania Court has directly addressed the issue in the present context, however, the Court goes on to cite a case using the terminology (Lewie's Lounge persuades us that the Defendants had statutory authority to remove the papers at issue without a warrant). Lewie's Lounge was a speakeasy in deference to the location in question which is a duly licensed location.

The Court also cites the Twenty First Amendment on page 6, footnote 8, which has no bearing in the issues raised by either the Plaintiff or the Defendants.

Footnote [8]

A complete reading of the Pleadings, Motions and Depositions on file will show that whomever crafted this Court Order created a scenario that is not supported by the record depriving the Plaintiff of his right to a fair and impartial evaluation. Further, the findings in paragraph e, page 2 are completely refuted in plaintiff's responsive Motion to Defense's Motion for Summary Judgment, page 9, paragraph

3, which shows that the defense misread the testimony contained in their exhibit and based the response on this reading. The findings in paragraph g. Page 2 do not contain a violation of a one man club. The findings in paragraph gg. Page 10 are based on the unconfirmed allegations of a one man club initiated by the mother of the Plaintiff's child and the defense never produced the evidence which they claim could have been altered if the books were not removed.

4. Representation:

The Plaintiff is a Pro-Se litigant who is on disability pension and currently suffering severe allergies which have impacted on the ability to respond to a Court Order within ten (10) days. The Order was received four (4) days after mailing.

5. Other Complaints and Proceedings:

The Plaintiff filed a Complaint of Misconduct with the Court by Fax transmission on February 28, 1998, which has not been responded to. There is a second proceeding Civil rights Action #98-290 which Plaintiff fears will be handled in a similar manner if analyzed by the same staff.

In closing Plaintiff points out that the Order in question was issued 4 days after the Plaintiff filed a response to a defense Motion for Dismissal in Civil Rights Action 98-290. K The Court also was evaluating on their own initiative a Rule to Show Cause why these two cases should not be consolidated. Plaintiff's filing of the response for dismissal included argument and evidence that showed that these two cases should be consolidated.

Signed this 23rd, Day of May, 1998.

I declare under penalty of perjury that the foregoing is true and corerct.

"s/ [signature]
Plaintiff Pro-Se

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD A. D'AURIA	:	CIVIL ACTION
	:	
V.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, et al,	:	
	:	No. 97-5863

ORDER

AND NOW, this 1st day of June, 1998,upon consideration of pro-se plaintiff's "motion for retrial," which we shall treat both as a motion for reconsideration as well as a motion to assign both of the above-captioned cases to another judge, and defendants' response thereto, and the Court finding that;

(a) In two separate civil rights actions (Civ. No. 97-5863 and 98-290), pro se plaintiff Richard A. D'Auria ()"D'Auria") has sued various Pennsylvania bureau of Liquor Control employees alleging violation of his constitutional rights;[1]

(b) On May 14, 1998, we entered summary judgment in favor of the defendants in civil action number 97-5863, see Richard A. D'Auria v. Commonwealth of Pennsylvania, Civ. No. 97-5863 (E.D. Pa. May 14, 1998);

[1] **On January 26, 1998, we issued a Show Cause Order why these two cases should not be consolidated under one civil action number. Based on the parties' responses to our Order, as well as a review of the factual and legal allegations in the complaints, we determined that these two cases should not be consolidated because they involved different questions of law and fact.**

(c) In his motion, D'Auria seeks reconsideration of that Order pursuant to Fed. R, Civ. P. 59;[2]

(d) In addition, D'Auria also argues that both civil action 97-5863 and 98-290 should be assigned to another judge because of an alleged "personal bias and prejudice against (him)," see D'Auria's Affidavit of Prejudice of Judge" and attached Complaint;

(e) Turning first to D'Auria's request for reconsideration, the purpose of a motion under Fed. R. Civ. P 59(e) is to "correct manifest errors of law or fact or to present newly discovered evidence,"Harsco Corp. v. Zlotnicki,779 F.2d 906, 909 (3d Cir. 1985);

(f) A motion for reconsideration is

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[2] In his motion, D'Auria requests reconsideration under Fed. R. Civ. P. 59(a) (new trial). As there was never a trial in this case, D'Auria request for reconsideration is properly treated under Fed. R. Civ. P. 59(e). Although a motion for reconsideration is not technically recognized under the Federal Rules of Civil Procedure, our Court of Appeals has stated that "(r)egardless of how it is styled, a motion filed within ten days of entry of judgment questioning the correctness of a judgment may be treated as a motion to alter or amend the judgment under Rule 59(e)." Rankin v. Heckler,761 F.2d 936, 942 (3d Cir. 1985). See also, Koshatka v. Philadelphia Newspapers, Inc. 762 F.2d 329, 333 (3d cir. 1985) ("A motion for reconsideration is properly treated as a motion under Rule 59(e)").

not be used, however, as a means to reargue a case or ask a court to rethink a decision it has made, see, e.g., "Wayne v. First Citizen's Nat. Bank, 846 F. Supp. 310, 314 (M.D. Pa.), aff'd, 31 F3d 1175 (3d Cir. 1994) (table),"Glendon Energy Co., v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993);

(g) Indeed, reconsideration of a previous Order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources, see e.g., Pennsylvania Ins. Guar. Ass'n v. Trabosh, 812 F. Supp. 522, 524 (E.D. Pa. 1992); see also "Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1231 (3d Cir. 1995);

(h) Under Rule 59(e), a party must rely on one of three grounds to alter or amend a judgment: (i) the emergence of new evidence not previously available, (ii) an intervening change in controlling law, or (iii) the need to correct a clear error of law or to prevent manifest injustice, see, e.g., "Nissin v. McNeil Consumer Products Co., Inc., 957 F. Supp. 600, 601 (E.D. Pa.), aff'd, 135 F.3d 765 (3d Cir. 1997) (table), "Smith v. City of Chester", 155 F.R.D. 95, 96-97 (E.D. Pa. 1994),"Cohen v. Austin, 869 F. Supp. 320, 321 (E.D. Pa. 1994);[3]

[3] In his motion, D'Auria does not allege either that there is newly discovered evidence or that there has been a change in the law since our May 14, 1998 Order. Accordingly, we will not address those issues.

(i) Upon a careful review of D'Auria's motion, it appears that D'Auria is simply trying to reargue the merits of his case and has not established either that there was a clear error of law or that a manifest injustice will occur;

(j) Accordingly, we will deny D'Auria's request for reconsideration;

(k) In addition, we also will deny D'Auria's request to assign the two cases to a different Judge;

(l) While D'Auria has expressed great displeasure with our Order of May 14, 1998 (as well as with our prior Orders in these two cases), he has not shown sufficient grounds under any known statutory or decisional authority for us to ask for the reassignment of these cases to another Judge of this Court; [4]

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[4] In his motion, D'Auria also notes that on February 20, 1998 he faxed a letter to our Chambers requesting that his cases be analyzed by a different member of my staff because of a perceived bias. To the extent that we will treat D'Auria's letter as a Motion, it is without merit, and, accordingly, it too is denied.

It is hereby ORDERED that Plaintiff's "motion for retrial" is DENIED.

BY THE COURT:

"s/ [signature]"
Stewart Dalzell, J.

APPENDIX D

UNREPORTED - NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-1565

RICHARD A. D'AURIA,
Appellant

v.

COMMONWEALTH OF PENNA.
PENNA STATE POLICE BUREAU OF LIQUOR CONTROL ENFORCEMENT; R. VEIT, OFFICER BUREAU OF LIQUOR CONTROL ENFORCEMENT; UNKNOWN MALE #1; UNKNOWN MALE #2; UNKNOWN MALE #3

On Appeal From the United States District Court For the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-5863)
District Judge: Honorable Stewart Dalzell

Submitted under Third Circuit LAR 34.1(a)
March 3, 1999
BEFORE: STAPLETON, MANSMANN and RENDELL, CIRCUIT JUDGES

(Filed APR 09 1999)

OPINION

PER CURIAM

Appellant Richard D'Auria, pro se, appeals the District Court's grant of summary judgment to the appellees in a civil rights action filed pursuant to 42 U.S.C. 1983. The District Court granted summary judgment based on its conclusion that the appellees were entitled to qualified immunity. For the reasons cited below, we will affirm.

The Appellant is the president of a private club called the James H. Irving 48th Ward Republican Club. This club holds a license to seel liquor, thus is regulated by the Pennsylvania Liquor Code. Appellant's complaint arises out of a warrantless search conducted pursuant to this Code by the appellees, four (4) Pennsylvania Bureau of Liquor Control Enforcement Officers. [1]

The undisputed facts show that the appellees scheduled a meeting with appellant to investigate possible Liquor Code violations. At that meeting, the officers seized several notes and records books for the 48th Ward, and a civic association's minutes book. Appellant claims that the appellees had no authority to conduct the search, to remove the notes and records books from the premises, or to take the civic association minutes book, as it was unrelated to the private club which held the liquor license.

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[1] Appellant voluntarily dismissed his action against the Commonwealth of Pennsylvania and the Pennsylvania Bureau of Liquor Control Enforcement once he was made aware that they were shielded by sovereign immunity.

Appellant also claims that the officers entered the premises with their guns drawn, at one point pointed a gun at his son's head, and attempted to enter the private residential quarters that were located on the same premises. Appellees have denied these allegations.

Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known." Harlow v.Fitzgerald, 457 U.S. 800, 818 (1982). Here, although the appellant has parsed out various provisions of the Liquor Code in an effort to show that the appellees failed to conform to those provisions, we find that the relevant provisions are not so clear as to constitute "clearly-established" statutory rights, and that, even were they so, appellant has not shown that the officers violated those clearly established statutory or constitutional rights.

Appellant first argues that the warrantless search of his premises was unreasonable as the officers lacked probable cause. We note that the liquor industry has long been considered a highly regulated industry. See e.g. Colonnade Corp. V. United States, 397 U.S. 72 (1969). There is a reduced level of privacy that comes with participation in hbgihly regulated industries, and courts have consistently held that warrantless searches of these types of industries do not offend the constitution. See New York v. Burger, 482 U.S. 391 (1986). However, "(warrantless) inspections of commercial property may be unreasonable if they are not authorized by

law..." Donovan v. Dewey, 452 U.S. 594, 599 (1980)(citing Colonnade Corp., 397 u.s. AT 77).

The appellees have admitted that they did not have probable cause to conduct a search, however, they state that probable cause was not necessary in this case because warrants are not necessary for conducting routine lawful inspection of licensed premises. See In re the Matter of the Catering Club Liquor License No. CC-4837, 438 A.3d 662 (Pa.Commw. 1981)(holding that probable cause was not necessary for search incident to a lawful inspection as 47 P.S. 4-493 governs such searches and does not require a warrant). We agree. Although 47 P.S. 2-211(3) authorizes warrantless searches only "upon reasonable and probable cause," a reading of the statute in its entirety reveals that the statute pertains to searches conducted for the purpose of finding "any liquor, alcohol or malt or brewed beverages unlawfully possessed, manufactured, sold, imported or transported..." We do not believe that this provision pertains to lawful inspections of a licensee's records conducted by the Bureau. Thus, although appellant has alleged that the appellees conducted a warrantless "search", the actions here are more appropriately classified as an "inspection", and a warrant was therefore not necessary.

Appellant next argues that the search was unreasonable in that it was not conducted during the normal business hours for the establishment. In New York v. Burger, 482 U.S. at 691, the Supreme Court held that warrantless administrative

searches must be conducted within certain established parameters. Specifically, "(a) regulatory statute must...limit the discretion of the inspecting officers," which means the search must be "carefully limited in time, place and scope." Id. at 703 (quoting in part United States v. Biswell, 406 U.S. 311 (1972). Here, the statute explicitly requires that officers conduct inspections during normal business hours. 47 P.S. 4-493(21)(providing that a liquor licensee may not refuse the right of inspection by officers of the board "at any time during which the premises are open for business, or when patrons, guests or members are in that portion of the licensed premises wherein either liquor or malt or brewed beverages are sold"). Although D'Auria's club is open only in the evening, the officers scheduled an appointment and conducted their inspection during the daytime. However, it is disputed that D'Auria agreed to meet with the officers during the daytime. We find that a reasonable officer would believe that consent would make an inspection outside of normal business hours lawful.

Appellant argues that even if other aspects of the search are deemed reasonable, the seizures here were unreasonable because the statute does not give the authority to seize documents. Here the officers seized several notes and record books from the premises, took the items to be copied and gave D'Auria a receipt. The statute not only requires a license to keep records, but provides further that it is illegal "for any licensee, his servants, agents or employees, to refuse the board of an authorized employee (sic) of the board or the

enforcement bureau access thereto *or the opportunity to make copies of the same when the request is made during business hours." 47 P.S. 493(12)*. Appellant is correct that the statute does not explicitly state that officers may "seize" these records, however, we find it implicit in the statutory language, that the officers would take or seize the records for copying.

In addition, the District Court held that the seizure was authorized by 47 P.S. 2-211(3), which permits seizure of "equipment, materials, (and) utensils." The Court relied on a Pennsylvania Commonwealth Court case which found that, for purposes of forfeitures under 47 P.S. 6-601, the terms "equipment, materials and utensils" included notebooks and documents used in the operation of a bar. Commonwealth v. Various Item's Seized From Lewie's Lounge on Janaury 5, 1989, 601 A.2d 380, 383 (Pa. Commw. 1991)f. While we agree that 2-211(3) or 6-601 offers support for the officers' actions, we conclude that it was reasonable for the officers to believe that the language of 4-493(12), which requires licensees to allow officers to make copies, authorized them to take documents and records from the premises for the purposes of obtaining those copies.

The seizure of the civic association minutes book, while somewhat more troubling, also did not preclude summary judgment for the appellees. The appellees concede that they seized this book and that the book was not related to the 48th Ward. However, the officers were on the premises for a relatively brief time, only between 15-25 minutes. We cannot find that, having found

the book on the premises, and having concluded that D'Auria was running a one man club, it was unreasonable for the officer to seize the book for further examination and review of whether D'Auria was in fact using the club for the proper purpose for which it was licensed, namely as a members' club rather than his own establishment.

Finally, D'Auria alleges that the officers entered his premises with their weapons drawn and pointed a gun at his son's head. The appellants have denied this allegation. Taking the allegation as true, as we must, we find that the officers' actions were not unreasonable as to deprive them of the protection of qualified immunity. Although we are inclined to think that, in light of the agreed meeting with the officers, there was less chance of encountering violence at the club, nonetheless an investigator's report on the 48th Ward written several months before the events in question indicated that appellant kept guns behind his bar. Officer Veit stated during his deposition that he solicited the assistance of another officer because he did not wish to enter the premises alone. We find that considering the information held by the officers at the time, entering the premises with their guns drawn, was not unreasonable.

In light of the forgoing, the District Court's grant of summary judgment to the appellees is affirmed.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-1565

RICHARD A. D'AURIA,

Appellant

v.

COMMONWEALTH OF PENNA.
PENNA STATE POLICE BUREAU OF LIQUOR CONTROL ENFORCEMENT; R. VEIT, OFFICER BUREAU OF LIQUOR CONTROL ENFORCEMENT; UNKNOWN MALE #1; UNKNOWN MALE #2; UNKNOWN MALE #3

On Appeal From the United States
District Court For the Eastern
District of Pennsylvania
(D.C. Civ. No. 97-cv-5863)
District Judge: Honorable Stewart Dalzell

Present: BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, McKEE, RENDELL, Circuit Judges

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SUR PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court, and to all the other available

circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

"s/ [signature]
Circuit Judge

Dated: May 12 1999

APPENDIX F

Richard A. D'Auria
P.O. Box 6444
1734 Snyder Ave
Philadelphia, PA 19145
Phone: 215-462-0310
Fax: 215-334-1233
February 19, 1998

Honorable Stewart Dalzell
United States District Court
for the Eastern District of Pennsylvania
U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1797

Re: D'Auria v. Veit 97-5863

Dear Sir:

The Court is currently considering motions for summary judgment. This communication concerns a previous motion that appears to have been analyzed improperly by a member of the Court's staff.

On December 23, 1997 I filed a motion for disclosure of the true identities of the three unknown defendants relating back to the date of the original pleading. The defense who was utilizing the designation unknown as late as December 3, 1997 in depositions responded on December 30, 1997, without objection, argument or explanation providing the names of the three individuals by means of an investigative report, filed by defendant Veit dated 10/16/95.

However my motion was denied as Moot, citing the unargued position that the defense already provided the names. The order remained silent on the request to amend the complaint to include the individuals named.

Perplexed I called the Court and requested the law clerk who processed the motion. A male informed me that there were a number of clerks. I related the problem to him, he immediately responded that the investigative report that contained the names was old and that the assumpt8ion was that I had received it. I asked him, "How do I amend the complaint if not by motion". The response was to seek out an attorney.

I then filed a second motion for an amendment relating back to the date of original pleading. The motion was unopposed and an order granted.

It appears that either the defense provided argument outside of the scope of the proceedings or that there is a bias on the part of the clerk. My concern is that the motions for summary judgment will not be afforded a fair and impartial review.

With all due respect, I am requesting that the current motions be analyzed by another member of the staff.

On another matter, I received a copy of a cover letter without content sent to the Court by defense counsel dated February 4, 1998. Their motion was filed on January 30, 1998. However the defense has not responded to mail, fax, or phone messages to my question. Is this just a copy of the original motion or new material. The letter nor its content were on file when I reviewed same at the clerks office.

Respectfully submitted,

"s "
Richard A. D'Auria
Plaintiff, Pro-Se

cc: Randell Henzes

02/20/98 FRI 14:31 FAX 12153341253
Richard A. D'Auria 001

****
*** TX REPORT ***
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TRANSMISSION OK

TX/RX No	0029
CONNECTION TEL	5802156
CONNECTION ID	
ST. TIME	02/20 14:30
USAGE T	00'51
PGS. SENT	2
RESULT	OK

Richard A. D'Auria
P.O. Box 6444
1734 Snyder Ave
Philadelphia, PA 19145
Phone: 215-462-0310
Fax: 215-334-1233

February 19, 1998

Honorable Stewart Dalzell
United States District Court
for the Eastern District of Pennsylvania
U.S. Courthouse
601 Market Street
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Re: D'Auria v. Veit 97-5863

Dear Sir,

The Court is currently considering motions for summary judgment. This

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